IN THE

Supreme Court of the United States

OCTOBER TERM 1949—No. 71.

FEDERAL POWER COMMISSION,

Petitioner,

vs.

THE EAST OHIO GAS COMPANY,
STATE OF OHIO,
THE PUBLIC UTILITIES COMMISSION OF OHIO,

Respondents.

BRIEF FILED ON BEHALF OF THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, AS *AMICUS CURIAE*.

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Preliminary Statement.

This case involves an attempt by the Federal Power Commission to exercise regulatory powers in respect to a local intrastate utility company engaged exclusively in the business of distributing and selling natural gas at retail to ultimate consumers, wholly within the State of Ohio.

NOTE: The petitioner, Federal Power Commission, will sometimes be referred to as "the Commission" and the respondent, East Ohio Gas Company, will be referred to as "East Ohio." Emphasis in quotations is supplied unless otherwise indicated.

The Natural Gas Act was not intended to endow the Commission with regulatory powers over such a company. On the contrary, it was intended to reserve to the states the exclusive jurisdiction to regulate such local distributing companies.

The Public Service Commission of the State of New York is the agency and instrumentality of the State of New York having broad regulatory jurisdiction over gas companies, and over the operations, properties and activities of such companies in the State of New York, under Article 4, §§64-77, and other provisions, of the New York Public Service Law (L. 1910, ch. 480, as amended). Section 5 of the Public Service Law provides, in part:

> "The jurisdiction, supervision, powers and duties of the public service commission shall extend under this chapter. * * *
>
> 2. To the manufacture, conveying, transportation, sale or distribution of gas (natural or manufactured or mixture of both) * * * for light, heat or power, to gas plants * * * and to the persons or corporations owning, leasing or operating the same."

The Public Service Commission of the State of New York believes that the assertion by the Federal Power Commission of jurisdiction over East Ohio in this case constitutes an attempted encroachment upon the powers of the states to regulate their local gas distributing companies, which powers were intended to be reserved to the states under the provisions of the Natural Gas Act.

Accordingly this brief is filed on behalf of the Public Service Commission of the State of New York, as *amicus curiae*, pursuant to subdivision 9 of Rule 27 of the Rules of this Court.

Opinions Below.

The opinion of the Commission is reported at 74 PUR (NS) 256. The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 173 F. 2d 429.

Question Presented.

The question in which the Public Service Commission of the State of New York is interested is the following:

Whether, under the provisions of the Natural Gas Act, an intrastate public utility company, engaged exclusively in the business of distributing and selling gas at retail to ultimate consumers within a single state, is subject to the broad regulatory powers of the Federal Power Commission simply because natural gas, originating outside of such state, is purchased and received by the company within the state (i. e. at the state line) and is transported by the company through its own high pressure "transmission" mains for some distance within the state, for the sole purpose of serving the local retail consumers of such company.

Statement of the Case.

A. The Facts.

The detailed facts of this case are set forth in the briefs of the parties and in the opinion of the Court below and for the sake of brevity we shall not repeat them. However, we wish to emphasize the following undisputed facts, as stated by the Court below.

> "* * * it is certain that all property and facilities owned and operated by East Ohio lie within the physical boundaries of the State of Ohio, that East

> Ohio distributes natural gas in Ohio by means of an extensive pipeline system, and that none of East Ohio's pipelines crosses state lines. Further, it is uncontroverted that [East Ohio] makes no sales of any kind to any other company for resale purposes and that none of the gas sold by [East Ohio] is consumed outside of Ohio, that is, none of the gas in the pipelines of East Ohio flows out of the State of Ohio'' (173 F. 2d at p. 430).

Also, as pointed out by the Court below, East Ohio ''has long been subject to complete regulation by the Public Utilities Commission of Ohio,'' and:

> ''There can be little doubt that [East Ohio] is now and has been very thoroughly and completely regulated by the Ohio Commission'' (173 F. 2d at p. 431).

B. The Determination of the Commission.

Despite the fact that the sole *raison d'etre* of East Ohio is the local distribution of natural gas for retail sale to ultimate consumers, except for which it would have no use for any facilities whatever, the Commission held that the ''transmission'' lines of East Ohio, by which it transports its own gas, within the State of Ohio, solely for the purpose of its own business of local distribution and sale of such gas to ultimate consumers, ''are not 'facilities used for' local distribution''; but are facilities used for ''the transportation of natural gas in interstate commerce'' within the meaning of Section 1(b) of the Natural Gas Act and, therefore, that East Ohio is a ''natural gas company'' within the meaning of the Act.

The Commission said:

> ''In arriving at this conclusion we recognize fully the intention of Congress, as expressed in §1(b) of the Natural Gas Act, that *local distribution of natural*

gas and the facilities used therefor shall be exempt from the jurisdiction of this Commission" (74 PUR (NS) at p. 263).

It is apparent, however, that the Commission did *not* give recognition to the conceded intention of the Congress, but attempted to do that which it disclaimed, viz.: to invade "the field of local regulation which the Congress has clearly reserved to the states" (74 PUR (NS) at p. 263).

C. The Decision of the Court Below.

The United States Court of Appeals for the District of Columbia Circuit correctly held that East Ohio "is not engaged in the transportation of natural gas in interstate commerce within the meaning of the Act" and that "it is engaged *solely* in the local distribution of natural gas to local consumers" (173 F. 2d at p. 433, italics by the Court). After pointing out that the Natural Gas Act was intended only "to fill in the gap" in regulation, as defined by the previous decisions of this Court, by supplementing state regulation with federal control of activities which were beyond the scope of state power, the Court below said in part:

> "All of the gas coming to East Ohio from out of state, gas furnished primarily by Hope and Panhandle, is already completely subject to federal regulation and comes to East Ohio at a rate set by the federal commission. There is thus obviously no gap in regulation in this case and the attempted assumption of jurisdiction by the federal commission in this instance, far from supplementing and reinforcing, constitutes unnecessary, undesirable and unintended usurpation of state regulatory authority which cannot be justified by either the terms of [the] Act or its legislative history" (173 F. 2d at p. 434).

Circuit Judge Edgerton dissented upon the authority of *East Ohio Gas Co.* v. *Tax Commission of Ohio*, 283 U. S. 465, decided in 1930, in which case it was held that the business conducted by East Ohio is "a business of purely local concern exclusively within the jurisdiction of the state" (283 U. S. at p. 471).

The decision of the majority of the Court below is eminently correct and should be affirmed by this Court.

Summary of Argument.

I.

The Natural Gas Act was not intended to subject local intrastate distributing companies, such as East Ohio, to the broad regulatory jurisdiction of the Federal Power Commission.

II.

East Ohio is not a "natural gas company." It is not engaged in the "transportation of natural gas in interstate commerce" within the meaning of the Natural Gas Act, but is engaged solely in local distribution, and its property and activities are specifically exempted from the jurisdiction of the Federal Power Commission.

III.

Extension of the Commission's jurisdiction under the Natural Gas Act to include East Ohio and others similarly situated would open up a vast new field of Federal regulation and would usurp existing state power, contrary to the intent of the Act.

ARGUMENT.

POINT I.

The Natural Gas Act was not intended to subject local intrastate distributing companies, such as East Ohio, to the broad regulatory powers of the Federal Power Commission.

A. The Act was not intended to occupy the entire natural gas field to the limit of constitutional power.

> "Without entering upon another review of its legislative history, suffice it to say that the Natural Gas Act *did not envisage federal regulation of the entire natural gas field to the limit of constitutional power.* Rather it contemplated the exercise of federal power as specified in the Act, *particularly in that interstate segment which the states were powerless to regulate* because of the Commerce Clause of the Federal Constitution. The jurisdiction of the Federal Power Commission was to complement that of the state regulatory bodies" (*Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U. S. 498, 502-3).

See also:

> *Panhandle Eastern Pipe line Co.* v. *Public Service Commission*, 332 U. S. 507, 519.

B. The Act was intended only to fill the hiatus in regulation with reference to wholesale distribution and sales.

Indisputably the primary purpose of the Natural Gas Act, as the Court below said, was to "fill in the gap" in regulation which had existed under the decisions of this

Court in respect to sales of natural gas at wholesale in interstate commerce.

> "Suffice it to say that by 1938 the Court had delineated broadly between the area of permissible state control and that in which the states could not intrude. The former included interstate direct sales to local consumers, as exemplified in *Pennsylvania Gas Co.* v. *Public Service Commission*, 252 U. S. 23; the latter, service interstate to local distributing companies for resale, as held in *Missouri* v. *Kansas Gas Co.*, 265 U. S. 298, reinforced by *Public Utilities Comm'n.* v. *Attleboro Co.*, 273 U. S. 83" (*Panhandle Eastern Pipe Line Co.* v. *Public Service Commission*, 332 U. S. 507 at p. 514).

The constitutional inability of the states to regulate interstate sales at wholesale left a well defined hiatus in the regulation of such sales of gas and electricity, which both the Natural Gas Act and the 1935 amendment to the Federal Power Act were designed to fill.

> *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission*, 332 U. S. 507;
> *Jersey Central Power & Light Co.* v. *Federal Power Commission*, 319 U. S. 61, 67-68;
> *Connecticut Light & Power Co.* v. *Federal Power Commission*, 324 U. S. 515, 524.

> "This impotence of the states to act *in relation to sales for resale by interstate carriers* brought about the demand for federal regulation and Congress' response in the Natural Gas Act" (*Panhandle Eastern Pipe Line Co.* v. *Public Service Commission*, 332 U. S. at p. 516).

In the carrying out of this purpose, Congress was very careful to supply the needed control only within the limits

of the hiatus in respect to the *wholesale* distribution of natural gas moving interstate (including regulation of the rates for its transportation and for its sale at wholesale), without overlapping of regulatory functions properly within the scope of state power. Thus in the *Panhandle Eastern Pipe Line Company* case, *supra*, the Court held that the Natural Gas Act had not superseded the regulatory power of the states over sales of natural gas at retail, and of the rates to be charged therefor, even though the sales in that case were made by an interstate pipe line carrier and were sales in interstate commerce.

C. The regulation of companies engaged in the "transportation of natural gas in interstate commerce" was intended to implement Federal regulation of wholesale distribution and sales.

The prime purpose of the Act being to regulate interstate sales of natural gas at wholesale, it is apparent that the provisions of the Act relating to the "transportation of natural gas in interstate commerce" were designed to implement the regulation of such sales by the Commission. This design is made clear by the declaration of policy contained in Section 1(a) of the Act, wherein it is declared:

> "that the *business* of transporting *and* selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas *and the sale thereof* in interstate and foreign commerce is necessary in the public interest."

Under the Act, the Commission was to be the "agency for regulating *wholesale distribution to public service companies* of natural gas moving interstate" (*Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.*, 314 U. S. 498, 506). The Commission's regulatory powers under the Act were designed to relate to such interstate business (in

which East Ohio is not engaged) and particularly to assist the Commission in the exercise of its prime function of fixing the wholesale rates.

> "The fixing of 'just and reasonable' rates (§4) with the *powers attendant thereto,* was the heart of the new regulatory system" (*Federal Power Commission* v. *Hope Natural Gas Co.* 320 U. S. 591, 611).

In respect to the "transportation of natural gas in interstate commerce," the plain intent of the Congress was to enable the Commission to exercise broad regulatory powers over companies engaged in the transportation of natural gas *antecedent* to final wholesale sales and delivery of such gas to local intrastate distributing companies. The same purpose is found in the Federal Power Act, relating to the regulation of interstate electric companies. Thus in *Jersey Central Power & Light Co.* v. *Commission,* 319 U. S. 61, where electric energy produced in New Jersey by Company A was delivered to Company B in New Jersey, and thence by an interconnection found its way to Company C in New York, jurisdiction of the Federal Power Commission over Company B was upheld. This Court said:

> "The purpose of this act was *primarily to regulate the rates and charges of the interstate energy.* If intervening companies might purchase from producers in the state of production, free of federal control, cost would be fixed *prior to the incidence of federal regulation and federal rate control would be substantially impaired,* if not rendered futile." (319 U. S. at pp. 71-72.)

Similarly, in *Interstate Natural Gas Co.* v. *Federal Power Commission,* 331 U. S. 682, the Court held that sales of gas by a "natural gas company" (concededly subject to the act), to three interstate pipeline companies for transportation, resale and ultimate consumption in other states,

constituted sales "in interstate commerce" within the meaning of the Act. The Court specifically referred to the *Jersey Central* Case (p. 688) and finally said (p. 693):

> "Unreasonable charges exacted *at this stage of the interstate movement* become perpetrated in large part in fixed items of costs which must be covered by rates charged subsequent purchasers of the gas, including the ultimate consumer. It was to avoid *such situations* that the Natural Gas Act was passed."

D. No Federal purpose intended to be implemented by the Act would be served by the exercise of the asserted jurisdiction over East Ohio.

East Ohio is not engaged in the "wholesale distribution • • • of natural gas moving interstate" (*Illinois Natural Gas Company* case, *supra*), and none of its properties or activities are devoted to such business intended to be regulated by the Natural Gas Act.

East Ohio does not sell any of the out-of-state gas to any other person or company for resale. It does not transport natural gas for any other person, and does not hold itself out as being willing to undertake such service. Upon delivery of the out-of-state gas to East Ohio, at the state line, the "incidence of federal regulation" (*Jersey Central* case, *supra*) has passed. All previously incurred "fixed items of cost" presumably are subjected to scrutiny by the Federal Power Commission, and are encompassed in the wholesale rates paid by East Ohio, which rates are fully subject to regulation by the Federal Power Commission (cf. *Interstate Natural Gas* case, *supra*). All costs incurred by East Ohio from the point of delivery of the out-of-state gas are fully subject to scrutiny and regulation by the Ohio Commission when it fixes the retail rates charged by East Ohio.

In *Connecticut Light & Power Co.* v. *Commission*, 324 U. S. 515, the Court refused to sustain an order of the Federal Power Commission exercising jurisdiction over an intrastate distributing company engaged in the local distribution of electricity originating in another state. The Court referred to the *Jersey Central* case, *supra*, and distinguished it, in part, as follows:

> "We held that the 'primary purpose' of the 1935 amendments to the Power Act was to give the Power Commission control of sales of energy across state lines which had been held to be beyond the control of the state of export in *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U. S. 83. Here, however, the federal authority to fix the sale price of the energy coming from Massachusetts in interstate commerce attaches and presumably has been or at least may be exercised pursuant to the *Jersey Central* holding *before the energy reaches this company. What petitioner does or fails to do is only after the incidence of federal regulation and can in no way frustrate it*" (324 U. S. at p. 524).

It is respectfully submitted that this rationale is directly applicable to the present case and that no federal purpose intended by the Natural Gas Act would be served by permitting the Commission to exercise the asserted jurisdiction over East Ohio.

The attempt of the Commission in its brief (pp. 42-49) to bolster its argument by reference to "the manner in which the Act would apply to respondent," under the provisions of Sections 5(b) and 7(a), (b) and (c) of the Act is futile for various reasons. Mention of only one will suffice. Each of said provisions endows the Commission with regulatory power only in respect to a "natural-gas company." The Commission might have referred to many

other provisions of the Act which *would* be applicable to East Ohio if it *were* a "natural-gas company." But the very point at issue in this case is *whether East Ohio is a "natural-gas company."* As this Court has said in rejecting a similar contention of the Commission: "The argument begs the question."

Federal Power Commission v. *Panhandle Eastern Pipe Line Co.*, 337 U. S. 498, 509;
cf. Connecticut Light & Power Co. v. *Federal Power Commission*, 324 U. S. 515, 535.

POINT II.

East Ohio is not a "natural-gas company." It is not engaged in the "transportation of natural gas in interstate commerce" within the meaning of the Act, but is engaged solely in local distribution, and its properties and activities are specifically exempted from the jurisdiction of the Commission.

The regulatory provisions of the Natural Gas Act are applicable to East Ohio only if it is a "natural-gas company." Section 2(6) of the Act defines a "natural-gas company" as "a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale." Section 2(7) of the Act defines "interstate commerce," in part, as "commerce between any point in a state and any point outside thereof." Under Section 1(b) of the Act as construed by this Court, the regulatory power of Congress attached to only three things. "These were (1) the transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale; and (3) natural gas companies engaged in such transportation or sale" (*Panhandle East-*

ern Pipe Line Co. v. *Public Service Commission*, 332 U. S. 507, 516).

The prime purpose of the Act, to regulate wholesale service and sales of natural gas in interstate commerce, is inapplicable to East Ohio. Concededly, East Ohio makes no sales "in interstate commerce for resale." All of its sales of natural gas are retail sales to ultimate consumers. None of them is subject to regulation by the Commission; under the *Panhandle Eastern Pipe Line* decision, *supra*, all such sales are fully subject to regulation by the State of Ohio.

East Ohio would be subject to the regulatory power of the Commission only if it were engaged in "the transportation of natural gas in interstate commerce," within the meaning of the Act. But East Ohio is not engaged in any such activity. East Ohio merely transports its own natural gas (purchased from others who had transported the gas in interstate commerce and sold the same to East Ohio at rates subject to regulation by the Commission) wholly within the State of Ohio, in the exercise of its sole function of distributing and selling natural gas at retail for local consumption in the State of Ohio.

The activities and properties of East Ohio fall squarely within the exemption contained in Section 1(b) of the Act:

> "The provisions of this act • • • shall not apply to *any other transportation* or sale of natural gas or to the *local distribution* of natural gas or to the *facilities used for such distribution* or to the production or gathering of natural gas."

In urging upon this Court an expansion of the jurisdiction of the Commission to embrace East Ohio, the Commission indulges in narrow legalistic reasoning which, blind to the background, legislative history and clear pur-

poses of the Act, and the decisions of this Court thereunder, could only lead to an unreasonable and improper result unintended by the Congress. The Commission reasons that here we have a "transportation" of natural gas; the mains are large, the pressure is high, the flow of gas is uninterrupted—an engineer or accountant would classify the operation as a "transmission." By reference to these same mechanical tokens, the Commission would have the Court conclude that the gas is transported by East Ohio "in interstate commerce," within the meaning of the Act.

In taking its stand the Commission has not only disregarded the admonition of this Court that in the construction of Section 1(b) "we should not lose sight of the objectives sought to be accomplished by Congress in passing the Natural Gas Act" (*Interstate Natural Gas Co.* v. *Commission*, 331 U. S. 682, 689) but the Commission has further disregarded the rejection by the Court of these merely mechanical considerations in determining the character of a transportation of natural gas.

> "Those merely mechanical considerations are no longer effective, if ever they were exclusively, to determine for regulatory purposes the interstate *or intrastate* character of the continuous movement and resulting sales we have here" (*Panhandle Eastern Pipe Line Co.* v. *Public Service Commission*, 332 U. S. 507, 512).

The important considerations and, we submit, the decisive considerations in the present case, are that the out-of-state gas is delivered to East Ohio, a local distributing company, at the state line, and thereafter the activities of East Ohio pertain exclusively to the local distribution of the gas for retail consumption wholly within the state and are

not within the scope of any intended purpose for which the Natural Gas Act was enacted.

All interstate business in the statutory sense ceases upon the sale and delivery of the out-of-state gas to East Ohio *at the state line.* From thenceforth no further transaction occurs which may properly be characterized as "commerce," or as a "transportation in interstate commerce" within the meaning of the Act. From that point East Ohio merely uses its own facilities for conveying its own gas in the furtherance of its own business of local distribution and sale of natural gas to ultimate consumers within the State of Ohio. Even before the enactment of the Natural Gas Act this Court had recognized that the interstate character of such a movement of gas may properly be said to cease "with the delivery of the gas to the distributing companies."

> *Missouri* v. *Kansas Gas Co.*, 265 U. S. 298, 308;
> *cf. Public Utilities Comm.* v. *Landon*, 247 U. S. 236, 245;
> *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.*, 314 U. S. 498, 504.

It is strange that after a lapse of over ten years since the enactment of the Natural Gas Act, the Commission and the dissenting Justice in the Court below have been compelled to place principal reliance for their position upon *East Ohio Gas Co.* v. *Tax Commission of Ohio*, 283 U. S. 465, decided long before such enactment. That case lends them no support whatever, for the following reasons: (1) The case related solely to the constitutional power of the State to tax the business of East Ohio. (2) The Court held that the State could impose the tax since the furnishing of gas by East Ohio to its consumers "is not interstate commerce but a business of purely local concern exclusively within

the jurisdiction of the State" (p. 471). (3) The statements of the Court with reference to the character of the transportation of gas in East Ohio's high pressure mains were pure *dicta*. As later pointed out, the Court was not "required to determine the exact point at which interstate commerce ceased and intrastate commenced" (*Connecticut Light & Power Co.* v. *Commission*, 324 U. S. 515, 534). (4) The merely mechanical tests referred to in that case have been specifically disapproved by this Court (*Panhandle Eastern Pipe Line Co.* v. *Public Service Commission*, 332 U. S. 507, 512). (5) The Court expressly rejected the reliance of the Commission upon that case in the *Connecticut Light & Power* case, when it said:

> "But a holding that distributing gas at low pressure to consumers is a local business *is not a holding that the process of reducing it from high to low pressure is not also part of such local business.* In so far as the Commission found in these cases a rule of law which excluded from the business of local distribution the process of reducing energy from high to low voltage in subdividing it to serve ultimate consumers, *the Commission has misread the decisions of this Court. No such rule of law has been laid down*" (324 U. S. at p. 534).

In the *Connecticut Light & Power Co.* case, *supra*, the Commission, upon the basis of purely mechanical considerations, sought to expand its jurisdiction under the Federal Power Act, to include local electric distributing companies receiving and distributing out-of-state energy. This Court held that Congress "meant what it said by the words 'but should not have jurisdiction, except as specifically provided in this Part and the Part next following . . . over *facilities used in local distribution.*'" The Court rejected

the construction of the Federal Power Act sought by the Commission, pointing out that:

> "as a practical matter [it] would transfer to federal jurisdiction the regulation of many local companies that we think Congress intended to leave in state control" (p. 531).

A proper analysis of the provisions of the Natural Gas Act, their legislative history as outlined in the briefs of the parties, and the clear purposes of the Act as enunciated in the decisions of this Court, can only lead to a similar conclusion. East Ohio is not engaged in the "transportation of natural gas in interstate commerce" and is not a "natural-gas company" within the meaning of the Act. East Ohio is engaged solely in the local distribution of natural gas in the State of Ohio and its properties and activities are expressly exempted from the jurisdiction of the Commission. Any other conclusion would inevitably result in improper encroachment upon the regulatory powers of the states contrary to the intent of the Congress embodied in the Act.

POINT III.

Extension of the Commission's jurisdiction under the Natural Gas Act to include East Ohio and others similarly situated would open up a vast new field of Federal regulation and would usurp existing state power, contrary to the intent of the Act.

The Federal Power Commission has not been made the general guardian of the public interest in the natural gas field. Under the Natural Gas Act it has been endowed with extremely broad regulatory powers, but only in respect to

interstate "natural-gas companies." The Congress did not intend that such powers should be exercised in respect to intrastate local distributing companies such as East Ohio. On the contrary it was intended that state control of such companies and their activities should remain unimpaired.

The Commission has not hitherto attempted generally to impose its full regulatory powers upon such local gas distributing companies.* Although the Natural Gas Act has been in effect for over ten years, this is the first time that the precise issues here involved have come before this Court. We have no knowledge of statistics which might show the number of local distributing companies throughout the country which would become subject to the broad regulatory powers of the Commission if its asserted jurisdiction were to be upheld in this case. Obviously there must be a great many.†

The effect of reversal of the decision of the Court below would be to completely transform the essential nature and

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* The Commission cites only a few sporadic instances involving partial exercise of its claimed statutory authority (under § 7 of the Act) in similar situations (brief p. 42, n. 23).

† The Commission has very recently asserted jurisdiction over the great manufactured gas companies operating in New York City which propose to receive natural gas within the State of New York, after the completion of its interstate journey, and to utilize such gas for mixing with manufactured gas solely for local distribution to ultimate consumers. On October 27, 1949 the Commission reversed a decision of its Examiner and held (with one Commissioner dissenting) that Consolidated Edison Company of New York, Inc., The Brooklyn Union Gas Company and Kings County Lighting Company, will each become a "natural gas company" under the Natural Gas Act, upon the completion of construction and commencement of operation of certain proposed facilities comprising about 38 miles of pipe line, wholly within the City of New York (F. P. C. Opinion No. 181, Docket Nos. G-1167, G-1171, G-1190). We do not concede that in the event of a reversal in the present case, such decision would govern said New York City cases. However, said cases illustrate the lengths to which the Federal Power Commission is going in attempting to expand its jurisdiction over local distributing companies under the theories advanced in the present case.

character of such companies and their activities. They would *ipso facto* lose their status as local distributors and become interstate carriers. Under the provisions of Section 7(a) of the Natural Gas Act the Commission would be empowered to direct them "to extend or improve [their] transportation facilities." In addition under Section 7(a) the Commission would be authorized to direct any such company "to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public." Thus the door would be opened to compulsory expansion of the activities of such companies to encompass "the sale in interstate commerce of natural gas for resale," a business for which such companies were not organized and in which they are not engaged. No such complete transformation of the character and activities of local distributing companies was envisaged by the Congress in enacting the Natural Gas Act.

The exercise by the Federal Power Commission of broad regulatory powers in respect to such local distributing companies (including, among others, the regulation of accounts and accounting involved in the present case) would in many instances duplicate the exercise by the state commissions of their normal regulatory functions under state laws and would greatly increase the possibilities of conflicts of jurisdiction, as well as of decisions, in respect to the same subject matter. Such interference with the regulatory powers of the states may be a necessary concomitant where it is required in order to carry out the proper purposes of the Natural Gas Act. Where no intended purpose of the Natural Gas Act is to be served, such interference is unwarranted.

Under the circumstances of the present case no federal purpose intended by the Natural Gas Act would be implemented by extending the jurisdiction of the Commission to cover East Ohio and other companies similarly situated. In this case, all purposes of the Act will have been fully subserved by the Commission's regulation of the interstate transportation of natural gas to the Ohio state line and by its regulation of the wholesale rates at which the gas is purchased by East Ohio. Upon receipt of the gas by East Ohio at the Ohio state line, the "incidence of federal regulation" has passed, and what East Ohio "does or fails to do" thereafter "can in no way frustrate" the federal regulation intended by the Act (*Connecticut Light & Power Co.* v. *Commission*, 324 U. S. 515, 524).

This case finds its direct parallel in the situation presented to this Court in the *Connecticut Light & Power* case. There, as here, the Federal Power Commission, by the application of purely mechanical and technological tests, and without reference to the intended policy of the Federal Power Act, sought to bring within the purview of its jurisdiction a large class of local electric distributing companies. The decision in that case, we believe, effectively blocked an unwarranted expansion of the Commission's activities in the field of electric utilities. Only a similarly restrictive decision by the Court in the present case will prevent an unwarranted expansion of the Commission's activities in the natural gas field and the concomitant encroachment upon state control of local gas distributing companies.

> "The Act, though extending federal regulation, had no purpose or effect to cut down state power. On the contrary, perhaps its primary purpose was to aid in making state regulation effective, by adding the weight of federal regulation to supplement and

reinforce it in the gap created by the prior decisions. The Act was drawn with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way" (*Panhandle Eastern Pipe Line Co.* v. *Public Service Commission*, 332 U. S. at p. 507, 517-518).

The claim advanced by the Commission in its brief that East Ohio falls within the gap in regulation which the Act was designed to fill, is wholly illusory. The decision of the Court below leaves no hiatus in regulation with respect to any property or activities of East Ohio. In the words used by this Court in the *Panhandle Eastern* case (p. 524) "The attractive gap which appellant has envisioned in the co-ordinate schemes of regulation is a mirage."

Conclusion.

The decision and judgment of the Court below are correct and should be affirmed.

Respectfully submitted,

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